

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JILL BLOOMBERG,

4 Plaintiff,

5 v.

17 CV 3136 (PGG)

6 THE NEW YORK CITY DEPARTMENT
7 OF EDUCATION and CARMEN FARINA,

8 Defendants.

Motion Conference

9 -----x

10 New York, N.Y.
11 May 1, 2017
12 3:10 p.m.

13 Before:

14 HON. PAUL G. GARDEPHE

District Judge

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17
18 APPEARANCES

19 MIRER MAZZOCCHI SCHALET & JULIEN, PLLC

20 Attorneys for Plaintiff

21 BY: JEANNE E. MIRER

MARIA L. CHICKENDANTZ

22 ZACHARY W. CARTER

23 Corporation Counsel for the City of New York

Attorney for Defendants

24 ANDREA M. O'CONNOR

WILLIAM A. GREY

25 Assistant Corporation Counsel

1 (Case called)

2 THE COURT: This is a hearing on plaintiff Jill
3 Bloomberg's application for a contemporary restraining order
4 and preliminary injunction. The plaintiff is the principal of
5 Park Slope Collegiate, which I will be referring to as "PSC,"
6 which I understand to be one of a number of public secondary
7 schools co-located at the John Jay Educational Complex in
8 Brooklyn. Citing the complaint docket number 1, paragraphs 4,
9 10 through 11, and 22.

10 The other schools are the Secondary School for
11 Journalism, the John Jay School for Law, and Millennium
12 Brooklyn High School. According to plaintiff, the students at
13 PSC, Journalism, and Law are predominantly African-American or
14 Hispanic, while the students at Millennium are 50 percent
15 African-American or Hispanic, and the remaining white or
16 Caucasian. Citing the Bloomberg affidavit docket number 10
17 Exhibit 3.

18 Plaintiff has been employed by the New York City
19 Department of Education since 1998 and has served as PSC's
20 principal for the past 13 years. Citing the complaint
21 paragraphs 10 through 11. According to the complaint,
22 throughout her 13 years at PSC, plaintiff has been an
23 "outspoken advocate" and has encouraged desegregation at PSC
24 and "opposed measures that reinforce and perpetuate de facto
25 segregation, such as student tracking and instituting gifted

1 and talented programs." Id. at 31.

2 The complaint alleges that on March 2, 2017, the
3 department of education's office of special investigations, or
4 OSI, informed plaintiff that she is under investigation.
5 Citing the complaint paragraph 60. The OSI informed plaintiff
6 that it is investigating allegations that plaintiff and two PSC
7 teachers are "members of a Communist organization known as the
8 Progressive Labor Party, that they are actively recruiting
9 students in the organization during school hours, and that they
10 invite students to participate in the organization's
11 activities, including marches for Communism." Citing the April
12 6, 2017, OSI letter docket number 10-8; the Guerra declaration
13 docket number 17 at paragraphs 11 through 16, 31 through 35.

14 The OSI contends that the allegations, if
15 substantiated, may constitute a violation of certain DOE
16 regulations, including chancellor's regulation D130, which
17 prohibits employee involvement in any activities of political
18 organizations during working hours. Id. See also Chickendantz
19 affirmation, docket number 4, Exhibit B, at page 2.

20 As part of the investigation, the OSI has sent
21 subpoenas to other PSC employees requesting their appearance at
22 interviews. Citing the Bloomberg affidavit docket number 10 at
23 paragraph 34. Plaintiff contends that the OSI's investigation
24 is baseless and was initiated in retaliation for a January 10,
25 2017, email she sent to Eric Goldstein, who oversees the DOE's

1 Public School Athletic League, and DOE superintendent Michael
2 Prayor, complaining that the DOE is "operating two separate and
3 unequal sports programs" at the John Jay educational complex.
4 Citing the complaint, docket number 1, 55-56 and 71; the Bloom-
5 berg affidavit, docket number 10 Exhibit 3. The email states
6 that students at the complex's predominantly black and Latino
7 schools, are offered fewer supports teams that the students at
8 Millennium, which, as I noted, is about 50 percent white. Id.

9 Plaintiff commenced this action on April 28, 2017,
10 asserting claims for retaliation under the First Amendment,
11 Title VI of the Civil Rights Act of 1964, and the New York City
12 Human Rights Law. Plaintiff has moved for a temporary
13 restraining order and a preliminary injunction enjoining the
14 OSI's investigation pending the outcome of this litigation.

15 Ms. Mirer, I'm happy to hear what you have to say in
16 support of the application.

17 MS. MIRER: Thank you, your Honor.

18 We received the opposition papers this morning at 10
19 o'clock and have had a chance to review them. In terms of the
20 application, we believe that, first of all, with respect to the
21 elements of an injunction, we meet all of them.

22 With respect to the First Amendment chilling effect,
23 we have submitted affidavits from not only Ms. Bloomberg but
24 also several teachers and administrative staff who have also
25 made statements, which I can quote if the Court is so inclined.

1 The affidavits are in the record. They are basically saying
2 that they feel there has been a huge impact on the school.

3 For example, in paragraph 7 of the affidavit of Rahsan
4 Williams, he says, "The OSI investigation against Jill has
5 eroded the trust and commitment we have spent years building.
6 It has made me fearful of standing up for our students and
7 speaking out against race discrimination because I'm afraid
8 that my speaking out against racism will be seen as
9 investigation-worthy by DOE. It has been difficult to maintain
10 my morale knowing that I can no longer fight integration and
11 anti-racism. Hence, that activity now comes with the
12 possibility of losing my teaching license."

13 He also says, "The investigation has splintered the
14 staff and the school environment I once considered a second
15 home. Because of this investigation of Principal Bloomberg,
16 PSC has become a place wrought with tension, fear, and
17 suspicion. Teachers who wholeheartedly support Jill are afraid
18 to provide affidavits of support in fear of retaliation from
19 the DOE. A few teachers have made it clear that they are
20 considering applying to other schools because of the chilling
21 effect of this investigation has had on our school environment.
22 The investigation is a great disservice to our students and our
23 families."

24 THE COURT: Let me break in. First let me say, let me
25 say this to both sides. I have read all the papers. It is

1 pointless to read things that you have already told me, because
2 I have already read it. I don't need to hear it again.

3 There are a few points that I want you to address, Ms.
4 Mirer, either this afternoon or in papers. Let me say at the
5 outset that I am going to give you an opportunity to submit a
6 reply to what the city submitted. Let me identify for you a
7 number of the issues I am concerned about. You are welcome to
8 tell me whatever you want to tell me, but I am going to tell
9 you what is on my mind.

10 The first thing I would mention that is on my mind is
11 the issue of whether the January 10, 2017, email that you claim
12 was the catalyst for the city's act of retaliation, what you
13 claim to be retaliation. My question is whether that email was
14 sent by Ms. Bloomberg in connection with her official duties as
15 the principal of PSC or rather simply as a citizen of New York
16 City. That's question number one.

17 Question number two: With respect to the point you
18 were telling me about chilling effect, the significance in your
19 view of the fact that you were able to obtain five affidavits
20 from PSC employees who are well aware of the investigation but
21 nonetheless felt free to express their viewpoint in the form of
22 the affidavits they submitted, not to mention the petition that
23 apparently was signed by 500 people or so, both of which would
24 tend to suggest that the First Amendment is alive and well at
25 PSC.

1 A third question: whether the initiation of an
2 investigation is sufficient to constitute adverse action for
3 purposes of the retaliation claim brought under the First
4 Amendment, Title VI, or the New York City Human Rights Law.

5 You repeatedly assert both in your papers, your brief,
6 as well as I think in your affidavit -- or maybe this is Ms.
7 Chickendantz's affidavit, I'm not sure which -- but the point
8 is that you assert that it is obvious that the initiation of
9 the investigation constitutes adverse action.

10 "Adverse action," of course, is a legal term. We
11 don't speak of it in colloquial terms. It has a definite
12 meaning under the law. The question is whether the mere
13 initiation of an investigation here is sufficient to constitute
14 adverse action for purposes of a retaliation claim under the
15 First Amendment, Title VI, or the New York City Human Rights
16 Law.

17 You cited no cases, zero cases, for the proposition
18 that the mere initiation of an investigation is sufficient.
19 Your adversary has cited a number of cases for the proposition
20 that an investigation standing alone is not sufficient. I am
21 going to want you to address that. I am going to want you to
22 cite case law to me showing that the mere initiation of
23 investigation is enough to constitute an adverse action for
24 purposes of a retaliation claim.

25 Fourth question. I want you to address the time line

1 of the investigation and in particular the city's assertion
2 that the investigation was actually opened in May of 2016,
3 after the city received an anonymous tip concerning your
4 client. The investigation was closed, according to the city,
5 because of a lack of information to substantiate the anonymous
6 tip. But then it was reopened later, after the city received
7 additional information. I want you to address that.

8 Then the fifth question, last question. The
9 defendants have said that neither the special commissioner for
10 investigation nor the OSI knew about Ms. Bloomberg's January
11 10, 2017, email at the time they commenced the investigation.
12 Their point is the January 10, 2017, email couldn't have had
13 anything to do with them commencing the investigation because
14 they didn't even know about it.

15 Those are five issues that I want addressed. As I
16 said, you are welcome to tell me whatever you wish now, but I
17 am going to give you the opportunity to respond in writing in
18 the nature of a reply which you can submit by 5 o'clock
19 tomorrow.

20 MS. MIRER: Thank you, your Honor. I will address
21 some of them just briefly.

22 With respect to your first question, the issue of
23 whether she is speaking as a citizen we think is covered by the
24 case of Matthews v. City of New York, which is I believe
25 directly on point. It's a case of a police officer who

1 reported the use of quotas for tickets and stop-and-frisks, and
2 the court found that he was speaking as a public citizen on an
3 issue of public concern.

4 THE COURT: Isn't the difference that the officer
5 wasn't responsible for the quota system, if there was one, but
6 here, as part of Ms. Bloomberg's daily responsibilities, she
7 presumably has some responsibility for resources at the school?
8 She has an obligation to see that the students at PSC are
9 receiving adequate resources.

10 I have to tell you that when I reviewed her email, it
11 sounded much to me like an email you might expect to see from
12 any person of authority at a school who feels that their
13 students are not receiving what they should be receiving in
14 terms of resources from the department of education.

15 This was in the context of sports and the number of
16 sports teams that were made available at PSC versus the number
17 of sports teams made available at Millennium. The point was
18 made that the PSC and the other schools were principally
19 African-American and Hispanic students whereas the Millennium
20 school was about 50-50. That point was made.

21 Other than that, it seemed to me very similar to what
22 I would expect countless principals have communicated to DOE on
23 other occasions: that they feel like their school is not being
24 properly treated, is not receiving the resources that it is
25 entitled to, and that the students are being shortchanged as a

1 result. That's what it read like to me.

2 I'm familiar with the case you cited. I wonder
3 whether it is exactly on point as you say. It seems to me that
4 it might be the case here that Ms. Bloomberg's responsibilities
5 actually involve the allocation of resources at her school, and
6 that in speaking or in sending an email communication to DOE
7 about her level of unhappiness with the resources that the
8 school is receiving, it seems to me she might have been acting
9 in her position as the principal of PSC rather than as a
10 concerned citizen.

11 MS. MIRER: I understand your point, your Honor. I
12 also would like to point out that part of the reason why we
13 claim there is retaliation for the speaking out and raising
14 these issues is this is not something that has been happening.
15 In fact, it is something that principals have not been doing,
16 and it's not been viewed as part of their job to do. In fact,
17 a concerned citizen could do the same. A concerned parent
18 could do the same.

19 That was the kind of thing that was raised also in
20 Matthews. But we will provide you a step-by-step analysis of
21 the Matthews case and why we think it is on point. We believe
22 the citizen analog point is very well taken and that Ms.
23 Bloomberg has, in essence, been doing things that the DOE seems
24 not to have taken up as an issue and in fact never resolved the
25 issue of resources. Even though they gave more sports teams to

1 the three majority black and Latino schools, they are still
2 segregated within the school in terms of who they play with.

3 Nevertheless, we will definitely get you a step-by-
4 step brief as to why we think she acted as a private citizen,
5 understanding that she also has a claim under Title VI, which
6 doesn't require that, and retaliation is outlawed under Title
7 VI as well.

8 THE COURT: I understand that. I was speaking in
9 terms of your First Amendment claim.

10 MS. MIRER: Absolutely.

11 With respect to the chilling effect in the affidavits
12 and the fact that some people have been willing to come forward
13 and say yes, I feel chilled, usually that doesn't happen. We
14 are very glad at least some people are willing to say, I feel
15 chilled, I feel this is a bad thing that is happening to the
16 school, it's impacting the school in a very negative way. And
17 they are saying, I'm afraid also in the future to speak out,
18 which is another part of the chilling effect of the First
19 Amendment.

20 So it is not something that we can say we just had
21 some affidavits of people who say, yes, I'm chilled. There are
22 50 teachers at the school. Five of them were willing to come
23 forward and complain about this investigation, just the mere
24 initiation of it, and the basis of which it is has been
25 initiated.

1 Your Honor I don't think we would be here if on March
2 2nd Ms. Berchey came in and said there has been an allegation
3 that the school was used wrongly after hours or that there was
4 some kind of question of students being filmed in a movie that
5 they didn't give authorizations for, the things that are now
6 being said as the reason.

7 What they came in and said is she is being
8 investigated for alleged Communist activities, which to me
9 really does throw a whole different spin and a whole different
10 McCarthyite kind of chill over the school. That's our
11 position. I think the affidavits support it. But they also
12 said there were others who are afraid to speak up in their
13 affidavit. We will address that more in detail for the Court.

14 With respect to the question of initiation, whether or
15 not it is an adverse action, with respect to First Amendment
16 adverse action, the standard is that in retaliation cases all
17 that is required to maintain a claim is to show that the action
18 would deter a similarly situated individual of ordinary
19 firmness from exercising his or her constitutional right. This
20 is stated in Birch v. City of New York, which is 184 F.Supp.3d
21 21, decided May 3, 2016, in the Eastern District of New York.

22 THE COURT: There are cases that actually have talked
23 about whether the mere initiation of an investigation, without
24 anything having happened in terms of negative consequences,
25 whether that is good enough. There is a case called Weber v.

1 The City of New York, 973 F.Supp.2d 227, 269 (E.D.N.Y. 2013),
2 which includes the following quote.

3 "Some courts have found that the commencement of an
4 investigation, even without attendant negative consequences, is
5 sufficient to establish an adverse employment action. However,
6 there are other cases that have gone the opposite direction,
7 specifically, Spaulding v. New York City Department of
8 Education, 2015 Westlaw 12645530, at *39 (E.D.N.Y. February 19,
9 2015), where the court found that allegations of sexual conduct
10 and a resulting OSI investigation did not constitute an adverse
11 employment action."

12 Also, Wright v. Monroe Community Hospital, 2011
13 Westlaw 3236224, at *7 (W.D.N.Y. July 28, 2011). "Employee
14 investigations, unwanted scrutiny from supervisors in negative
15 performance evaluations without attendant negative results, or
16 deprivation of position/opportunity do not sufficiently
17 constitute adverse employment actions under Title VII."

18 So there is a bit of a split of authority on the
19 point. It appears we haven't completed our research on it. I
20 welcome your citations. But suffice it to say that some courts
21 have found that the mere initiation of an investigation is not
22 sufficient to constitute an adverse action for purposes of a
23 retaliation claim.

24 MS. MIRER: We will definitely follow up on that, your
25 Honor. I do not believe in Spaulding that the actual

1 allegation was that the OSI investigation was commenced. I
2 believe it was allegations of false accusations. We will
3 definitely address this issue in our brief to be filed by 5
4 o'clock tomorrow.

5 On the issue of the date of the investigation starting
6 in May, obviously we do believe that that supports our claim of
7 retaliation in the sense that something was made anonymously in
8 May, not viewed as sufficient to be a basis for an
9 investigation, and closed.

10 THE COURT: They say they got more information I think
11 it is on December 22, 2016. They say they got more
12 information, and they say that the additional information
13 allowed them to identify the person who provided the tip, and
14 they say that they then interviewed that person and got
15 additional information. And because of all of that, they say
16 they reopened the investigation on February 1st.

17 MS. MIRER: We understand that that is their position,
18 your Honor. We also know that on January 25th they sent this
19 information to both the DOE, defendant in this case, and the
20 OSI, making it clear that the DOE had notice of what was in
21 these claims.

22 I do want to point out that with respect to each of
23 those claims, for example, there is a theory or a statement
24 made that the concern was that there was a movie -- many of
25 these allegations are allegations that do not require an OSI

1 invite. All of them we would say don't require an OSI
2 investigation. If there is a concern as to whether or not an
3 entity used a school building after hours, there are permits
4 that are required to do that. They can check the permits.

5 There was a permit for the showing of a movie called
6 Profiled in June of 2016. There was a permit for that. If
7 there is an allegation that plaintiff's husband was somehow
8 involved with a foundation that they claim is somehow connected
9 to this political party, the foundation has a website. You can
10 call up the foundation. You can find out what they did in
11 terms of whether or not they gave money to the filmmaker. Not
12 Jill Bloomberg, the filmmaker.

13 This film has been shown at Sun Dance, the Brooklyn
14 Academy, the Brooklyn Museum, other places. It has won awards.
15 This is a movie that they are talking about. This is
16 information that could be --

17 THE COURT: I thought their point about the move was
18 that, first of all, some students were shown in it without
19 their permission. Then I thought they were saying that the
20 movie was shown and people were charged admission to see it at
21 the school. Did I misunderstand?

22 MS. MIRER: That's what their allegation is. But this
23 is something that could have been verified with the filmmaker.
24 The filmmaker, Karen Foster, is listed as the maker of the
25 film. It's her obligation to get whatever releases she needs.

1 Ms. Bloomberg had nothing to do with that. She had nothing to
2 do with the filming.

3 The fact that a foundation that is a public charity
4 gave a grant along with many other funding institutions gave
5 grants to help fund this movie has nothing to do with whether
6 or not Jill Bloomberg did anything wrong. And these are things
7 that could have been easily, easily looked into and found and
8 verified with the filmmaker, with the foundation, with the
9 permitting.

10 My understanding is that nobody was charged a fee.
11 They were allowed to give a contribution if they so wanted.
12 This is the kind of thing that could have easily been
13 investigated independent of an OSI investigation.

14 THE COURT: You're saying it could easily be
15 investigated but it can't be investigated by OSI?

16 MS. MIRER: What I'm saying is that the allegations
17 that have come forward have really nothing to do with Jill
18 Bloomberg.

19 THE COURT: I thought the city's position was that
20 they had received a tip that they did have something to do with
21 Ms. Bloomberg. Isn't that what they are saying?

22 MS. MIRER: They may have had a tip. But what we are
23 saying is that if you're going to start an OSI investigation,
24 which is no small matter -- it's no small matter for somebody
25 to be under an OSI investigation. If you read the allegations

1 in terms of what does it mean, you're not told what it is
2 about, you can be asked questions, you don't get to sign
3 anything, it could be used against you. It could be a fishing
4 expedition for somebody else's political vendetta. This is not
5 any small matter, to open an investigation.

6 What I'm saying is that if there is a complaint and if
7 one of the allegations is there was a movie shown at the
8 building after hours, there is a way for them to find out
9 without opening an investigation into Jill Bloomberg. There is
10 a permit that is signed. You know who asked for the permit.
11 You can talk to that person.

12 If there is an allegation that there is a foundation
13 behind it, if there is an allegation that people didn't have
14 signed releases, you talk to the filmmaker. You don't open an
15 investigation into the principal of the school.

16 All I'm saying is that the reasonable person would
17 know this. So unless they were really trying to find something
18 that they could start an investigation on in retaliation for
19 the actions that we say are protected, there would be no reason
20 to rely on this kind of accusation.

21 There is an allegation that her husband was involved
22 in this. That has nothing to do with Jill Bloomberg being a
23 principal. Frankly, your Honor, if you read D130, it is
24 absolutely clearly that D130 relates only to elected office.
25 It does not relate to anybody's political views.

1 THE COURT: It is clear, is it not, that a teacher or
2 principal or an assistant principal can't promote any political
3 organization, period? They are not allowed to do that during
4 working hours at the school, are they? They are not allowed to
5 promote any particular political party, are they?

6 MS. MIRER: This is what D130 says. "School buildings
7 are not public forums for purposes of community or political
8 expression. The following sets forth the rules which govern
9 the use of access to the buildings," etc.

10 There are visits by people who are candidates for
11 public office. It says while on duty or in contact with
12 students, all school personnel.

13 THE COURT: I'm sorry. I can't hear you.

14 MS. MIRER: This is subsection (c)(1) of D130. "While
15 on duty or in contact with students, all school personnel shall
16 maintain a posture of complete neutrality with respect to all
17 candidates. Accordingly, while on duty in contact with
18 students, school personnel may not wear buttons, pins, articles
19 of clothing, or other items indicating a candidate, slate of
20 candidates, or police organization committee."

21 The political organization that they are referring to
22 is a political organization supporting a particular elective
23 candidate.

24 THE COURT: You're arguing that it actually would be
25 appropriate for a teacher or principal to actively recruit

1 students to become members of a political organization during
2 school hours? Is that your position? There isn't any
3 regulation that prohibits that?

4 MS. MIRER: We don't think that D130 prohibits that,
5 first of all. And Ms. Bloomberg has not done that. Ms.
6 Bloomberg is a principal.

7 THE COURT: There is an allegation that she did that.
8 I read it to you at the outset. The city is alleging that they
9 received a tip, an allegation from someone who says that she
10 was recruiting students to join something called the
11 Progressive Labor Party and that she was inviting them to
12 participate in that organization's activities during school
13 hours. That's what the city says. Whether that is true or
14 not, I don't know, but they have definitely alleged that, no
15 question about it.

16 I hear what you are saying about D130. But are you
17 telling me there is no regulation that would prohibit a teacher
18 or principal from attempting to recruit students who join a
19 political party or to participate in the activities of a
20 political party during school hours? Is it your position that
21 there is no such regulation and that teachers and principals
22 are in fact free to do that?

23 MS. MIRER: Your Honor, first of all, this reminds me
24 of the Kramer case.

25 I want to back out a little bit because there has been

1 no specific allegation of time, place, date, specific students,
2 what specific things, etc., that my client was alleged to do.
3 She denies doing that. She knows that her job is to be the
4 principal and to advocate for the students, and she has put
5 forward in her affidavit all of the things that she has done
6 with respect to fighting against racism, fighting against
7 criminalization of students, all of the things she feels had
8 fostered the kind of very nurturing environment at that school.

9 With respect to the question of what happened in the
10 Kramer case, your Honor -- I don't know if we mentioned it, but
11 we will -- a teacher was giving a course on HIV/AIDS and she
12 wound up asking the students what they thought in terms of --
13 it was part of sex education. She wound up putting on the
14 board some words that were maybe vernacular for certain body
15 parts having to do with sex. She was taken out of the
16 classroom for eight months for doing this. Judge Weinstein
17 found this particular rule that they cited for her was
18 unconstitutionally vague.

19 At this point, if the school system wants to create
20 some type of rule about what is or is not permissible speech
21 during the day, about whether or not you can say I happen to
22 believe this way but I'm not making anybody believe that way,
23 or so on, if the school system wants to come out with some kind
24 of regulation that is not vague and unconstitutionally
25 overbroad, maybe we would say there might be a problem. But

1 right now under these allegations we don't know what she is
2 charged with.

3 We know that there is some vague allegation of
4 recruiting, there is some vague allegation of asking people to
5 participate in marches. This is not something that you make an
6 investigation for and put a well-respected principal under a
7 microscope for. That's my position. We will argue it more
8 specifically in our brief. We think that at this point what's
9 happening is that the school system has backed off quite
10 substantially from claiming that that is the issue.

11 (Pause)

12 THE COURT: Go ahead.

13 MS. MIRER: I'm not exactly sure where I was.

14 THE COURT: The point you were making is you feel that
15 the city has backed off some of the allegations that it made.
16 I assume you're referring to the April 6th letter to Ms.
17 Chickendantz. I think what you were telling me is you felt the
18 city had backed off some of the allegations that were made in
19 that letter. That's the point you were making a moment ago.

20 MS. MIRER: First of all, I want to say that I think
21 the allegation about recruiting Communist activities, etc., I
22 think that was in the May allegation which they closed. That's
23 what my understanding is, and that they didn't revive it until
24 there were these other things that related to the movie which
25 was called Profile.

1 THE COURT: All I know is I'm looking at an April 6th
2 letter from I believe it is OSI to Ms. Chickendantz, and it
3 says, "The complaint being investigated is that Jill Bloomberg
4 and two teachers at the Park Slope Collegiate School are
5 members of a Communist organization known as the Progressive
6 Labor Party, that they are actively recruiting students in the
7 organization during school hours, and that they invite students
8 to participate in the organization's activities, including
9 marches for Communism." That's April 6th. That's what they
10 say on their investigation.

11 MS. MIRER: Right. In their affirmation to this
12 Court, they say different things. They don't reiterate that.
13 They talk about that her husband is involved in --

14 THE COURT: I agree with that. I'm looking at Charity
15 Guerra's declaration. Paragraph 37 reads as follows. "OSI is
16 conducting an investigation to ascertain whether plaintiff used
17 her position as a DOE employee to advance the beliefs of a
18 particular political party and engage in impermissible
19 political activity in violation of chancellor's regulations and
20 conflicts of interest law. DOE regulations do not prohibit
21 exposing students to the complete spectrum of political
22 ideologies. Similarly, OSI's investigation will determine
23 whether plaintiff violated academic policy and conflict of
24 interest rules."

25 It seems to me that is consistent with what they said

1 they were investigating on April 6th

2 MS. MIRER: That's true. That is the only place where
3 it is consistent, your Honor.

4 But I do want to point out that really if you look at
5 this closely, they are claiming that they are not investigating
6 her for believing, but they are saying they are investigating
7 her as to whether or not she used this position to advance a
8 political party.

9 The political parties at issue in D130 are ballot-
10 accessed political parties, not an organization that may or may
11 not have any kind of basis for running an election or having
12 run an election. That is number one. So we think that D130
13 can't be violated, and they don't have a right to investigate
14 that.

15 Whether or not she has advanced the beliefs of a
16 political party -- the thing that I got most incensed about,
17 having myself a civil rights background and knowing, from
18 Dombrowski v. Pfister forward, is that people who support civil
19 rights and integration have often been called Communists.

20 So, when you put that together, this is really what is
21 being investigated, her political belief, and whether or not
22 she, as someone who has been outspoken on behalf of her
23 students and fighting racism in society and in the school
24 system, can have that label put on her or should have that
25 label put on her to the point that it would be investigated.

1 That's what is bringing this case within the First Amendment,
2 your Honor.

3 Frankly, I don't see a difference. You're saying you
4 can have the belief but you can't state what your beliefs are?
5 I'm sorry. That to me is the same thing as investigating the
6 beliefs.

7 THE COURT: To repeat, I think what the city is
8 alleging -- again, I don't know whether there is any basis for
9 it or not -- the city is asserting that your client was
10 recruiting students to join this political party and to
11 participate in their activities. That is the complaint they
12 say they received. That is the complaint they claim they are
13 investigating. I understand your position that your client
14 didn't do either of those things. But that is what they are
15 saying they were told in the complaint they received and that's
16 what they say they are investigating.

17 MS. MIRER: Your Honor, if it was anything else
18 besides raising the specter of Communism, they would have been
19 required to say how, who, what, when, tell me the dates and
20 times, give me specifics, and they are not. That's why this
21 investigation is so dangerous. That's why this investigation
22 is so dangerous. We will, of course, address this in more
23 detail.

24 THE COURT: Is it your contention that either the
25 special commissioner for investigation or OSI knew about your

1 client's January 10, 2017, email at the time they opened this
2 investigation? Is that your contention?

3 MS. MIRER: Our contention is that they either knew
4 about it or they could have easily found out and could have had
5 constructive knowledge. Certainly by January 25, 2017, the DOE
6 had knowledge of the allegations, and OSI is a part of DOE.
7 There is no question that they would have had knowledge.

8 THE COURT: I'll hear from the city.

9 MS. MIRER: Thank you, your Honor.

10 MS. O'CONNOR: Thank you, your Honor. I'll be very
11 brief.

12 With respect to the issues raised by your Honor that
13 were addressed by plaintiff's counsel, with respect to the
14 issue of whether or not the plaintiff was speaking as a
15 concerned citizen on a matter of public concern, we share the
16 same view that Matthews v. City is not on point, that it is
17 distinguishable, and that the topics that were discussed in the
18 January 10th email are squarely within her job duties as a
19 principal in terms of allocating resources to her students and
20 to advocate on behalf of the students for resources that she
21 believes they are entitled to. Again, these are the job duties
22 of a principal.

23 With respect to the chilling effect, it's counter-
24 intuitive to believe that there would be affidavits submitted
25 by teachers who say I am feeling chilled but not chilled enough

1 to not submit this affidavit, and that is essentially what the
2 argument is. The case law is quite clear that there has to be
3 an actual chilling of the First Amendment speech in order to
4 suffice as irreparable harm.

5 THE COURT: Who do I look to to figure out whether
6 there is a chilling effect? You have mentioned the five
7 individuals who put in affidavits. Your adversary says there
8 are lots of other people that weren't willing to put in
9 affidavits because they are chilled by the initiation of this
10 investigation. Who do you contend I look to in order to
11 determine whether there is a chilling effect or not?

12 MS. O'CONNOR: With respect the allegations that there
13 are unidentified teachers unwilling to come forward, obviously
14 those allegations in the affidavits are hearsay. I understand
15 we have an issue of how can we identify people who don't wish
16 to be identified. But those are hearsay statements.

17 THE COURT: Do the rules of evidence apply to a
18 hearing on a preliminary injunction? The answer is no, they
19 don't. The answer is no, they don't.

20 MS. O'CONNOR: They are relaxed.

21 THE COURT: The answer is no, they don't. Again, I
22 return to my original question, which is who do I look to to
23 determine whether there has been a chilling effect? Do I
24 understand you to be conceding that I can look at people who
25 didn't submit affidavits who plaintiff alleges were chilled and

1 are sufficiently concerned about the initiation of the
2 investigation that they wish to play no part in challenging
3 what plaintiff says is discriminatory conduct taking place at
4 the John Jay complex? Who do I look to?

5 MS. O'CONNOR: Your Honor, I would ask you to look at
6 this courtroom. You have indicated that the First Amendment
7 expression at PSC is alive and well, and I think that this
8 courtroom is evidence of that. So to the extent there is some
9 allegation that the First Amendment rights of PSC employees,
10 parents, students have been chilled, this very courtroom
11 demonstrates otherwise.

12 With respect to unidentified teachers -- may I
13 proceed, your Honor?

14 THE COURT: Please. There will be silence. Go ahead.

15 (Continued on next page)
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1 MS. O'CONNOR: With respect to looking to unidentified
2 teachers who refuse to come forward, again, the evidence that's
3 in the record now suggests otherwise. We have five individual
4 teachers who have put forth affidavits in relatively short
5 order in support of this motion, one of whom is going to be
6 questioned by OSI herself. And even in spite of that, she
7 decided to put in an affidavit. The balance of the evidence
8 certainly tips in favor of that there is no chill at all.

9 And with respect to the plaintiff individually, there
10 is evidence that she has continued to engage in the same
11 activities that she was before March 2, when she was advised of
12 the OSI investigation. She met with teachers and parents
13 wherein she discussed the investigation and her belief that it
14 was retaliatory. It is our understanding that she was a
15 speaker at a council sponsored by Park Slope Civic Council on
16 March 30, again discussing school segregation. So she's
17 continuing to engage in the same activities that she was
18 engaging in, in advance of learning about the OSI
19 investigation.

20 So I think, when looking at the evidence in the
21 record, it overwhelmingly shows that there is no actual chill.

22 THE COURT: But are you conceding that in determining
23 whether there is a chill, I can look beyond the plaintiff to
24 consider others, for example, other employees of the DOE at
25 PSC. Are you conceding I can look to them as well as the

1 plaintiff, in determining whether there's been a chilling of
2 First Amendment rights?

3 MS. O'CONNOR: Your Honor, plaintiffs have cited to no
4 such case law that can allow the Court to consider unidentified
5 individuals in considering whether or not there has been an
6 actual chill. I don't know how they can prove an actual chill
7 without any evidence of such. So, no, I'm not conceding that.

8 THE COURT: All right. Go ahead.

9 MS. O'CONNOR: With respect to, counsel also brought
10 up the point that she believed that the fact that OSI
11 essentially tabled or closed the complaints made in 2015 is
12 evidence of retaliation. We would --

13 THE COURT: 2016.

14 MS. O'CONNOR: 2016. Thank you, your Honor. We would
15 argue that it's the exact opposite. If DOE's motives were
16 retaliatory, why not move on the first allegation?

17 THE COURT: Well, but they're saying that the premise
18 is that the urge to retaliate happened on or about January 10,
19 2017, when she sent the e-mail. That's their position. So the
20 fact that they didn't take action against her in May 2016, from
21 plaintiff's point of view, is kind of irrelevant because
22 they're pegging the desire to retaliate on the January 10, 2017
23 e-mail. So that's their position.

24 MS. O'CONNOR: Well, also, your Honor, in looking at
25 all of the plaintiff's affidavit, she has, according to her,

1 has a very long history of engaging in the same activities,
2 over the course of a decade. So the activities have been going
3 on for quite some time. The only difference here is that the
4 OSI received an allegation against Ms. Bloomberg that they
5 needed to investigate.

6 With respect to counsel's, essentially her questioning
7 of why an OSI investigation was needed into these allegations,
8 I mean, I think it's quite clear what counsel was describing
9 was in fact an investigation. Interview witnesses, interview
10 the film maker, find out whether or not there was a permit,
11 look to the web site. This is the definition of an
12 investigation and what OSI will do unless the Court stops the
13 investigation in its tracks. This is what the DOE is trying to
14 do. OSI is the entity within DOE that is charged with
15 conducting the very investigations that counsel is describing.

16 THE COURT: Now, your adversary says that there is
17 actually no chancellor's regulation that prohibits a principal
18 or other employee of DOE from promoting political organizations
19 during school hours. What regulation is it that you're
20 relying -- are you relying on this D-130 or are you relying on
21 something else?

22 MS. O'CONNOR: Yes, your Honor, it's D-130, and I can
23 hand a copy up to the Court.

24 THE COURT: That would be great.

25 MS. O'CONNOR: Your Honor, and I can direct your

1 attention to the bottom of the third page, subsection C, that's
2 titled "Conduct of Officers and Employees."

3 THE COURT: Yes.

4 MS. O'CONNOR: Plaintiff's counsel has represented
5 that it seems to only apply when there is a specific candidate
6 that is at issue. That's against the plain reading of
7 subsection C.1, which refers to "a candidate, candidates, slate
8 of candidates, or political organizations or committees." So
9 it involves not just a particular candidate; it involves whole
10 political organizations.

11 And to the extent that counsel is somehow arguing that
12 it is impermissible for the DOE to impose --

13 THE COURT: Well, let's just stick with that for a
14 second.

15 MS. O'CONNOR: Yes, your Honor.

16 THE COURT: That sentence that you read says,
17 "Accordingly, while on duty or in contact with students, school
18 personnel may not wear buttons, pins, articles of clothing, or
19 any other items advocating a candidate, candidates, slate of
20 candidates, or political organization committee."

21 MS. O'CONNOR: Subsection 2, your Honor -- I should
22 have pointed that out as well -- reads, "Personnel may not be
23 involved in any activities, including fundraising on behalf of
24 any candidate, candidates, slates of candidates, or any
25 political/organization committee during working hours."

1 THE COURT: OK.

2 MS. O'CONNOR: And to the extent plaintiff's counsel
3 is contending that there is no basis for the DOE to require
4 that its employees maintain a posture of political neutrality
5 during working hours, that contention has been rejected by the
6 Southern District in a case that's cited in our brief. It's
7 Weingarten v. Board of Education, cited on page 25 of
8 defendants' brief, that finds that the DOE does in fact have a
9 legitimate pedagogical interest in avoiding partisan politics,
10 essentially. So that contention has already been rejected by
11 courts of this Circuit.

12 With respect -- and the only additional item I'd ask
13 the Court is, since plaintiff is going to be permitted to
14 submit a reply brief tomorrow, I would ask that defendants have
15 the opportunity to review the brief and then request oral
16 argument if needed, if we believe that there are any
17 outstanding issues that we need to address with the Court, or
18 we can, if the Court would prefer a surreply in lieu of an
19 argument, that we be permitted to submit one.

20 THE COURT: You can review plaintiff's brief when you
21 get it and then make an application, and I certainly will
22 consider it. You should say in the application whether you
23 want the opportunity to put in a letter or whether you want to
24 argue points, and I will rule on the application.

25 What is your position on when SCI and/or OSI learned

1 of plaintiff's January 10, 2017 e-mail?

2 MS. O'CONNOR: When OSI learned of the e-mail?

3 THE COURT: Either SCI or OSI.

4 MS. O'CONNOR: I can't speak for SCI. They are an
5 entity separate and apart from DOE. In terms of when OSI
6 learned of the e-mail, I can address that in a supplemental
7 briefing. I can't say a specific date now. I do know, based
8 on the declaration submitted by Ms. Guerra, that they were not
9 aware of the e-mails at the time the decision was made to
10 reopen the investigation.

11 THE COURT: All right.

12 So anything else you want to say?

13 MS. O'CONNOR: Unless your Honor has questions.

14 THE COURT: All right. Ms. Mirer, anything else you
15 want to say?

16 I guess there is one thing I would ask you to respond
17 to right now, which is, I would have to make a finding of
18 chilling effect. Are you really contending that your client
19 has been chilled, and do the facts support that, given the fact
20 that she's made a number of public statements about the matter,
21 as I understand it, after she found out about the
22 investigation?

23 MS. MIRER: She has said in her affidavit that she
24 does feel chilled.

25 THE COURT: But subjective assertions of being chilled

1 aren't going to cut it. You have to look at what the facts
2 are. And when someone continues to advocate for their position
3 after an investigation of this sort has been initiated, it does
4 raise the issue whether someone has actually been chilled or
5 not. And this frequently comes up in First Amendment cases,
6 where people say their rights have been chilled but yet they're
7 advocating with the same vigor the point that they were
8 advocating before the alleged retaliatory act took place. So
9 it's a common question. It comes up in a lot of these cases:
10 has the person been chilled or not and if so why are they
11 basically saying the same things after the alleged retaliation.

12 MS. MIRER: First of all, the only thing that was
13 alleged that she said after the fact was to -- after knowing of
14 the investigation -- was to explain to the school community
15 that her beliefs that this was a retaliatory investigation, the
16 fact that she spoke at an outside forum, unrelated to her work
17 at DOE, would not be evidence of her not being chilled. The
18 fact that she was asked to speak at a forum on her views
19 outside the DOE, which is what my co-counsel mentioned, is not
20 something that would impact her conduct within the school.

21 THE COURT: Anything else you want to say?

22 MS. MIRER: I have two things. One is that, obviously
23 we'll put this in our brief, but we do think that there is
24 strong evidence of likelihood of success on the merits. And we
25 would ask if the Court would, at least for now -- the

1 investigation is on hold, and if it would be possible to not
2 have to have any of the school community go to investigations
3 while this matter is pending, we would appreciate the Court
4 asking the DOE to refrain until such time as we have the
5 ability to have the hearing -- I mean have your Court's
6 decision.

7 THE COURT: Well, let me tell you what I intend to do.
8 I've already given you the right to submit a reply,
9 which I've asked you to submit by 5 o'clock tomorrow,
10 addressing the five questions I had as well as anything else
11 you want to say. And then the city will have an opportunity to
12 request, either the opportunity to put in a surreply or to
13 raise points that it wishes to make at oral argument. But it
14 is my intention to rule on the matter at a 5 o'clock hearing on
15 Wednesday, May 3. So the matter is not going to sit for a long
16 time.

17 Anything else?

18 All right. We will issue an order with the schedule
19 that I've outlined. If there's nothing else, we're adjourned.

20 MS. MIRER: Could I just clarify, until May 3rd,
21 should there continue to be investigation --

22 THE COURT: Does the city have any intention of
23 attempting to interview people between now and 5 o'clock on
24 Wednesday, May 3?

25 MS. O'CONNOR: Certainly if the Court is instructing

1 us not to, we will not do so.

2 THE COURT: Well, let me say this. I think any
3 intelligent lawyer understands that when a matter is sub judice
4 before the Court, it's probably not a great idea to take
5 action?

6 MS. O'CONNOR: Understood, your Honor.

7 THE COURT: OK.

8 MS. MIRER: Thank you, your Honor.

9 THE COURT: All right. Thank you both.

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